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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

NO. 585

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, T. L. McCollister, L. C. Hamilton, T. T. Jackson, Jr., Sidney Page, M. L. Williams, H. A. Stokes and B. J. Poe,

Petitioners

vs.

SEABOARD COAST LINE RAILROAD COMPANY and BROTHERHOOD OF LOCOMOTIVE ENGINEERS,

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENT SEABOARD COAST LINE RAILROAD COMPANY IN OPPOSITION

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October, 1969

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QUESTIONS PRESENTED

(1) Can one union subject to the Railway Labor Act secure a Federal District Court injunction to prevent implementation of a valid labor agreement entered into between a railroad and another union also subject to the Railway Labor Act thereby evading the exclusive statutory jurisdiction of the National Mediation Board?

(2) Can a union frustrate consummation of an Interstate Commerce Commission-approved railroad merger by now insisting on Railway Labor Act procedures for changing a former tripartite agreement that the union has already agreed to bilaterally renegotiate pursuant to an employee protection agreement under Section 5(2)(f) of the Interstate Commerce Act?

STATUTES INVOLVED

While this case does involve the Railway Labor Act 45 U.S.C., as Petitioner asserts, Section 152 (Ninth) is the particular section involved. This case also involves the Interstate Commerce Act, 49 U.S.C., particularly Sections (5)(2)(f) and 5(11). The relevant section of the Railway Labor Act is as follows:

Section 152 (Ninth):

> "Dispute as to Identity of Representatives—
> Mediation Board to Designate
>
> "If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this Act, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the

representative so certified as the representative of the craft or class for the purposes of this Act. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph."

The relevant sections of the Interstate Commerce Act are:

Section 5(2)(f)

"As a condition of its approval, under this paragraph (2), of any transaction involving a carrier or carriers by railroad subject to the provisions of this part, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four

years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this Act, an agreement pertaining to protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees."

and Section 5(11):

"The authority conferred by this section shall be exclusive and plenary and any carrier or corporation participating in or resulting from any transaction approved by the Commission thereunder, shall have full power (with the assent, in the case of a purchase and sale, a lease, a corporate consolidation, or a corporate merger, of a majority, unless a different vote is required under applicable State law, in which case the number so required shall assent, of the votes of the holders of the shares entitled to vote of the capital stock of such corporation at a regular meeting of such stockholders, the notice of such meeting to include such purpose, or at a special meeting thereof called for such purpose) to carry such transaction into effect and to

own and operate any properties and exercise any control or franchises acquired through said transaction without invoking any approval under State authority; and any "carriers or other corporations, and their officers and employees and any other persons, participating in a transaction approved or authorized under the provisions of this section shall be and they are hereby relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transaction. Nothing in this section shall be construed to create or provide for the creation, directly or indirectly, of a Federal corporation, but any power granted by this section to any carrier or other corporation shall be deemed to be in addition to and in modification of its powers under its corporate charter or under the laws of any State."

STATEMENT

The "basically simple" facts of this case, as the Petitioner has characterized them, should be likened to an iceberg. Much more lies beneath the surface.

The merger of the Atlantic Coast Line Railroad and Seaboard Air Line Railroad that thus became the Seaboard Coast Line Railroad, while securing the approval of the Interstate Commerce Commission and this Court, has not enjoyed

the wholehearted support of the Brotherhood of Locomotive Firemen and Enginemen (Record, Vol. I, pp. 8-9) [1 & 2] . To fully appreciate how BLF&E's original opposition to the merger has evolved to this case, several events are significant.[3]

Two Employee Protection Agreements

It is a fundamental truism of railroad mergers that only when the overlapping labor contracts and duplicating labor forces of the two separate rail lines are consolidated can the merger fulfill its promise (Record, Vol. I, p. 25). Therefore, while the Interstate Commerce Commission approval was being judicially reviewed, ACL and SAL managements commenced negotiations on two *Agreements for the Protection of Employees in Event of Merger* — one agreement to be with a group of unions that included BLF&E and the other agreement to be solely with BLE (Record, Vol. I, pp. 89-122).[4]

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[1] The following abbreviations will be used throughout:
Atlantic Coast Line Railroad—ACL
Seaboard Air Line Railroad—SAL
Seaboard Coast Line Railroad—SCL
Brotherhood of Locomotive Firemen and Enginemen—BLF&E
Brotherhood of Locomotive Engineers—BLE

[2] *Seaboard Air Line R. Co. — Merger — Atlantic Coast Line R. Co.*, 320 ICC 122 (1963), and *Florida East Coast Ry. Co.* v. *United States*, 259 F. Supp. 993 (D.C.M.D., Fla., 1966), affirmed 386 US 544 (1967).

[3] A factor of equal influence arises from union organization by craft lines in the railroad industry. The alleged encroachments by one union upon another's scope of work continue to require judicial attention as exemplified by the BLE-BLF&E competition present here (Record, Vol. II, pp. 59-60).

[4] There had to be two separate and distinct Agreements because the BLE was not a member of the Railway Labor Executives' Association which represented BLF&E and virtually all other unions on the ACL and SAL. Hereafter they will be referred to as BLE Protection Agreement and BLF&E Protection Agreement, respectively.

The merging ACL and SAL recognized that they were governed by two pertinent provisions of the Interstate Commerce Act which not only sanctioned such Agreements, but, further, that the merging railroads were insulated from all other "restraints, limitations and prohibitions" of federal law.[5] Accord was reached on the BLF&E Protection Agreement on November 3, 1966.

One week later, the BLE Protection Agreement was executed. With the *ACL-SAL Merger* case pending in this Court,[6] BLF&E (through the Railway Labor Executives' Association) consented to a granting of the ACL/SAL motion to dismiss the RLEA appeal of the lower court's decision approving the merger.

These two separate Protection Agreements are, loosely speaking, in the words of the Petitioner, "virtually identical", but where distinctions do exist, they represent the factual cornerstone of Respondents' case. The relevant similarities and contrasts will be traced. Each of the respective Protection Agreements had three basic objectives defined in Section 1:

> "The fundamental scope and purpose of this Agreement is (a) to provide for the protection of defined employees of Seaboard and Coast Line as herein set forth, (b) to expedite the changes in services, facilities and operations involved in such merger, and (c) to prescribe the procedures by which existing agreements between the parties shall be modified and consolidated to conform with the changes in service, facilities and operations involved in such merger."

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[5] 49 U.S.C. §5(2)(f), 49 U.S.C. §5(11).

[6] Approval by this court was followed by consummation of the ACL-SAL merger on July 1, 1967. Note [2], *supra*.

Objective (a) was immediately accomplished by key language in Section 2(b) as it appears in both Protection Agreements:

> "None of the present employees of either of the said carriers shall be deprived of employment or placed in worse position with respect to compensation, rules, working conditions, fringe benefits or rights and privileges pertaining thereto at any time during such employment."

With this promise of virtual working lifetime job security being fulfilled to many thousands of employees by means of a guaranteed monthly income, it became imperative for SCL to begin to realize the quid pro quo — merger benefits that were so far proving to be illusory (Record, Vol. I, pp. 21-26). The two merged railroads were streamlined in name only with train movements continuing along the old separate tracks because of the separate seniority rosters and separate, overlapping seniority districts which acted as a barrier to effecting rearrangement of train operations and services by SCL (Record, Vol. II, pp. 57-58).

The merged SCL needed contractual assurance that each union would expeditiously negotiate consolidated seniority districts and rosters and this obligation is embodied in Section 3(b) of the respective Protection Agreements. It is here that a meaningful divergence in the two Protection Agreements takes place. The BLE Protection Agreement provides:

> "(b) *The Merged Company will take over and assume all contracts, schedules and agreements between Seaboard, Coast Line, and the labor organization signatory hereto* concerning rates of pay, rules and working conditions and fringe benefits in effect at the time of consummation of the said

> merger and will be bound by the terms and provisions thereof, *and such agreements will be merged into a new agreement* through negotiations covering all employees of the Merged Company *in each craft with consolidation of seniority rosters and seniority districts for engineers.*" (Emphasis supplied)

The Petitioner fails to acknowledge the key distinctions in Section 3(b) of the BLF&E Protection Agreement:

> "(b) *The Merged Company will take over and assume all contracts, schedules and agreements between Seaboard, Coast Line, and the labor organizations signatory hereto* concerning rates of pay, rules and working conditions and fringe benefits in effect at the time of consummation of the said merger and will be bound by the terms and provisions thereof, *and such agreements will be merged into new agreements* through negotiations covering all employees of the merged Company *in each craft with consolidation of seniority rosters and seniority districts for each class and craft of employees.*" (Emphasis supplied)

To give further credence to the intent of the Protection Agreement framers to individually bind each separate union to the obligation to merge *all* old agreements into one new agreement "in each craft", Section 7(a) of the BLF&E Protection Agreement has the following pointed language:

> "It shall be considered and construed as a separate agreement between the Seaboard Coast Line and each of the labor organizations signatory hereto."

Because only one labor union was signatory to the BLE Protection Agreement, this provision would have been superfluous and therefore was excluded.

Since the Petitioner has now advanced an argument relating to arbitration, it should be factually noted that each of the Protection Agreements contains an arbitration clause which by its terms requires "any dispute or controversy" involving the "interpretation or application . . . of this Agreement, or any implementing agreement" between SAL, ACL or SCL "and any labor organization signatory to this Agreement" to be submitted to an arbitration committee.

[It is important at this juncture to appreciate the distinction between a Schedule Agreement and an Implementing Agreement. Both are called for by Section 3(b) of each of the Protection Agreements. A Schedule Agreement is that basic contract which defines the rules, rates of pay and working conditions of the employees of a particular craft or class. An Implementing Agreement as it relates to the merger of ACL and SAL provides for a consolidation of several seniority districts and seniority rosters into one district with one roster.]

BLE Implementing Agreement and BLF&E Opposition

Historically there has been an "ebb and flow" by railroad employees between the crafts of engineers and firemen, respectively, because of fluctuations in the railroad's business volume coupled with the availability of men to perform the work (Record, Vol. I, p. 154). On the former ACL, the former SAL, and the merged SCL the BLE was and is the sole legally constituted bargaining agent for the craft of Engineers and the BLF&E was and is the sole legally constituted bargaining agent for the craft of Firemen, both representative capacities having been certified by the National Mediation Board. To fully appreciate the bargaining rights vested in one union to represent one craft, it must be recognized that

an employee is never represented by both unions simultaneously because he works only in one craft or the other at any given moment (Record, Vol. II, pp. 58-59).

With the BLE Protection Agreement and the BLF&E Protection Agreement each providing a method for the negotiation of new Schedule Agreement in each craft, meetings between the unions and SCL Management commenced. Because there were certain provisions of the BLE Schedule Agreements on the former ACL that were tripartite in nature wherein the BLF&E had participated in negotiations and had reached agreement concerning their terms, SCL had hoped that there could be continued three-way discussion of the certain limited aspects of Engineers' and Firemen's work that had overlapping features.[7] Contrary to the allegations by the Petitioner, SCL played no part in the "breaking off" of tripartite discussions, but rather the cessation of these meetings was another manifestation of the competition existing between the BLE and BLF&E (Record, Vol. I, pp. 176-179).

Bilateral negotiations continued under what the SCL believed to be the mandate of law with representatives of the BLE and BLF&E separately and on December 19, 1967, the SCL and the BLE reached an accord on implementing agreements whereby the 31 old seniority districts for Engineers existing on the former ACL and SCL were consolidated into only six districts, with one seniority roster for Engineers in each district as provided in Section 3(b) of the BLE Protection Agreement.

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[7] Certainly it is acknowledged that whenever two railroad crafts are competing for certain aspects of the available work and a collective bargaining agreement is negotiated between a railroad and one of the two competing unions, the other union might well be "affected". The fact remains that an employee never works in two crafts at the same time.

The BLF&E objected to the fact that SCL and BLE had reached this Agreement, and at Petitioner's request the effective date of January 16, 1968, was postponed for one week. With the effective date drawing near, two State Court suits were instituted by dissident employees, one in Savannah, Georgia, and one in Florence, South Carolina, and ex parte temporary restraining orders were issued only to be subsequently dissolved.

Prior to the dissolution of the South Carolina State Court injunction, however, the BLE in its desire to place its agreements into effect on a systemwide basis sued for a mandatory injunction in the United States District Court for the Middle District of Florida against the SCL on January 29, 1968.[8] It was the position of the BLE that it had an agreement that was fair to its members and consistent with its duty under the BLE Protection Agreement, and therefore it should be implemented. It was the position of the SCL that it had likewise negotiated this same agreement in good faith, but that with an outstanding South Carolina State Court injunction (that affected a seniority district that extended beyond that state's border into Georgia), implementation of the agreement should not be accomplished on a piece-meal basis. SCL had entered into the agreement that the BLE sought to enforce and was therefore hardly in a position to challenge its validity or legality. Its sole disagreement with the BLE involved the timing of the agreement's effective date because of pending litigation in the South Carolina Court.[9]

The District Court injunction that ordered effectuation on the implementing agreements systemwide, excepting that

[8] It is indeed intriguing to see the Petitioner complain of no notice in this suit only to later affirmatively allege that a jurisdictional dispute was not involved.

[9] An issue that was later rendered moot.

seniority district covered by the South Carolina State Court injunction, was issued on January 30, 1968. The Court concluded:

> "Where a union has demonstrated itself to be the exclusive bargaining agent for a craft, as has the plaintiff herein, the mere fact that an agreement it enters into 'affects' members of other crafts and unions is not enough to give those interested parties the right to contest that agreement. *Order of Ry. Conductors & Brakemen* v. *Switchmen's Union of No. Amer.*, 269 F. 2d 726, 732 (5th Cir., 1959)."

Also, on January 30, 1968, BLF&E sought an injunction in the United States District Court for the Southern District of Florida to restrain SCL and BLE from placing in effect the binding agreements that had been previously negotiated. BLF&E contended that tripartite provisions and a mediation agreement contained in the old schedule agreement had been breached and, further, that the Court should enjoin SCL and BLE to resume tripartite negotiations on those issues involving intercraft mobility between Engineers and Firemen. In addition, BLF&E claimed that SCL and BLE should be required to continue all tripartite agreements existing between the parties until such time as all parties signatory thereto modified them in accordance with the Railway Labor Act.

In response, SCL filed its motion to dismiss stating that BLF&E had failed to state a cause of action because in essence, the BLF&E complaint was claiming the right to a voice in another union's collective bargaining agreement. SCL asserted its duty to bargain exclusively with BLE, the union certified as the sole bargaining agent for the craft of engineers, and therefore the complaint merely demonstrated the existence of a jurisdictional dispute between BLF&E and BLE. Second-

ly, SCL contended that the District Court lacked jurisdiction over the subject matter because this was a dispute properly within the exclusive jurisdiction of the National Mediation Board. SCL also argued that the Court order in the U.S. District Court for the Middle District of Florida was res judicata because the Court found the "existence of a jurisdictional dispute between the parties."

In considering both the BLE and SCL Motions to Dismiss, the BLF&E was denied its request for a preliminary injunction by the U.S. District Court and upon the entry of a final order the BLF&E appealed to the United States Court of Appeals for the Fifth Circuit.

The Jacksonville and Miami cases were consolidated and the U.S. Court of Appeals affirmed both lower court decisions at 413 F.2d 19 (5th Cir., 1969).[10] In so deciding the Jacksonville case, the exclusive authority of the National Mediation Board to determine whether one union encroached upon another union's jurisdiction was upheld and res judicata applied to the Miami case.

ARGUMENT

While the Petitioner feels constrained to assert the "novel and important" qualities of his case,[11] the Respondents are likewise compelled to demonstrate that the questions presented by the Petitioner are actually a cloak for its insist-

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[10] As the Fifth Circuit opinion noted, if the Jacksonville decision properly barred the BLF&E effort to assert its interest in a case involving the BLE collective bargaining agreement with SCL, then "the principles of res judicata are applicable to fully litigated issues raised by a motion to intervene."

[11] The arbitration argument certainly is novel to this case since it was not seriously argued below nor even mentioned in the original complaint.

ence upon invading the exclusive bargaining sphere of Respondent BLE.

As for the suggestion that a granting of certiorari herein would have a soothing influence upon labor relations in the railroad industry, Respondent SCL recognizes that when the BLE and BLF&E are in a jurisdictional dispute, "harmonious" labor relations to one is anathema to the other. It is with full cognizance of this bitter "fact of railroad life" that Respondent SCL respectfully submits that Petitioner has failed to present any question worthy of the grant of certiorari for the reasons that follow:

A. Railway Labor Act procedures for altering collective bargaining agreements do not apply in this case.

Shorn of its embellishments, Petitioner's first argument is that a former tripartite agreement between ACL, BLE and BLF&E has survived immunities granted by the Interstate Commerce Act, 49 U.S.C § 5(11), supersession by the BLF&E Protection Agreement, and Petitioner's prior statement to this Court that it no longer opposed the merger [12] — all because of the alleged overriding quality of Section 6 of the Railway Labor Act, 45 U.S.C. §156. Respondent submits, however, that it can and will demonstrate how the old tripartite agreement was legally superseded without resort to the notice and negotiation provisions of the Railway Labor Act.

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[12] As Petitioner well appreciates, if it succeeded in this suit, the practical effect would be to force SCL to degenerate into ACL and SAL (if unscrambling an egg is possible) insofar as its more than 2000 locomotive engineers are concerned. The six BLE seniority districts would multiply into 31 and six seniority rosters would somehow have to also be expanded to 31.

1. Petitioner agreed to negotiate solely for its craft and solely with SCL.

As this Court will recall, while the appeal in the *ACL-SAL Merger* case [13] was pending herein, the railroad managements and the unions entered into two Agreements for Protection of Employees. One was the BLF&E Protection Agreement which included Petitioner and all other unions represented by the Railway Labor Executives' Association and the second was the BLE Protection Agreement which had only two signatories — the Respondents.[14] Both were pursuant to the last sentence of Section 5(2)(f) of the Interstate Commerce Act, 49 U.S.C.:

> "Notwithstanding any other provisions of this Act, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees."

It is recognized by all parties that BLF&E is *sole* legal bargaining agent for the craft of fireman and in that role BLF&E agreed that its old Schedule Agreements would "be merged into new agreements . . . *in each craft* with consolidation of seniority rosters and seniority districts *for each class and craft of employees.*" (Emphasis supplied) It must also be recognized that the BLF&E Protection Agreement was to be "considered and construed as a separate agreement between the Seaboard Coast Line and each of the labor organizations signatory

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[13] Note[2], *supra.*

[14] Curiously, if it deemed tripartite agreements so essential, BLF&E had ample opportunity to demand BLE's participation in the BLF&E Protection Agreement since it was executed one week *before* the BLE Protection Agreement.

hereto." *Petitioner had contractually committed itself to a two-party Schedule Agreement with SCL.*

Apparently Petitioner does not now desire to give meaning to the most significant words *"in each craft,"* the very language that by its only logical interpretation supersedes any second thought that tripartite negotiations or agreement should now be required. In both law and fact, the ultimate truth that can be drawn from these two separate Protection Agreements is the mandate of this Court when it defined the affirmative duty of the railroad to negotiate with the authorized collective bargaining agent who exclusively represents that craft in *Virginian Railway Co.* v. *System Federation No. 40*, 300 U.S. 515 (1937):

> "The obligation imposed on the employer by §2, Ninth, to treat with the true representative of the employees as designated by the Mediation Board, when read in the light of the declared purposes of the Act, and of the provisions of §2, Third and Fourth, giving to the employees the right to organize and bargain collectively through the representative of their own selection, is exclusive. *It imposes the affirmative duty to treat only with the true representative, and hence the negative duty to treat with no other.*" (Emphasis supplied)

Also see *Steele* v. *Louisville & Nashville R. Co.*, 322 U.S. 192 (1944) and *Elgin, J. & E. R. Co.* v. *Burley*, 325 U.S. 711 (1945).

It is here that Petitioner finds itself in the proverbial roundhouse. The BLF&E Protection Agreement has abrogated any requirement for tripartite discussion and yet Petitioner is forced to vigorously deny the obvious — the existence of an

overripe jurisdictional dispute for which there is only one forum, the National Mediation Board.

2. *The National Mediation Board has exclusive jurisdiction over the claims of Petitioner.*

Through the oft-repeated assertion by Petitioner that the old tripartite agreement requires Railway Labor Act notice and tripartite negotiations, one persistent question looms: Whose work would the negotiations cover, Engineers' or Firemen's? If the latter, then all BLF&E had to do was negotiate bilaterally with SCL and reach an accord on the new implementing and schedule agreements covering merger of seniority districts and rosters plus work rules.[15] But if the agreement sought by the Petitioner purports to cover Engineers' work, then BLF&E has framed the classic jurisdictional dispute and in the words of the Fifth Circuit below, "the issue is not one for judicial consideration."

As stated in argument at the District Court level, "a merger situation is a different breed of cat."[16] Petitioner is, in essence, seeking a restoration of the "status quo", a much-litigated, nebulous subject. The blunt truth here, as recognized by the Court below, is that "a merger by its very nature requires changes in the status quo." Indeed, alteration of the status quo was the purpose of the BLF&E Protection Agreement.

The ACL and SAL are extinct by approval of the Interstate Commerce Commission (and, ultimately, this Court).[17] Likewise, the old BLE and BLF&E collective bargaining agreements have vanished through contractually required craft-by-craft negotiation and accord on new agree-

[15] Which they did.
[16] Record, Vol. II, p. 66.
[17] Note [2], *supra*.

ments.[18] Thereafter, whatever Petitioner seeks here must fall within the broad sphere of exclusive jurisdiction of the National Mediation Board, so well defined in this Court's trilogy of landmark cases.[19]

The case of *General Committee of Adjustment of the BLE* v. *M-K-T R. Co.*, 320 U.S. 323 (1943), has many telling factual similarities to the facts herein. In each case the BLE and BLF&E were the designated and sole bargaining agent for their respective crafts. Each union in each case had provisions in their respective agreements covering the movement, the so-called "ebb and flow", of men from Fireman to Engineer and back again. Therein, as here, a dispute arose over the method of calling demoted Engineers or returning Engineers from Fireman ranks. Petitioner disclaims applicability of this and the other *General Committee* cases,[20] but this Court plainly upheld the exclusive jurisdiction of the National Mediation Board:

> "It seems to us plain that when Congress came to the question of these jurisdictional disputes, it chose not to leave their solution to the courts. As we have already pointed out, Congress left the present problems far back in the penumbra of those few principles which it codified. Moreover, it selected different

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[18] Not on the consummation of the merger as the dissent below suggests has been Respondent's position. Quite the contrary it is recognized that the old agreements were viable until superseded bilaterally by separate agreements as required by the respective Protection Agreements.

[19] *General Committee of Adjustment, etc.* v. *Missouri-Kansas-Texas R.*, 320 U.S. 323 (1943); *General Committee of Adjustment, etc.* v. *Southern Pacific Co.*, 320 U.S. 338 (1943); and *Switchmen's Union of North America* v. *National Mediation Board*, 320 U.S. 297 (1943).

[20] Petitioner's Brief, pp. 13-14.

> machinery for their solution. Congress did not leave the problem of inter-union disputes untouched. It is clear from the legislative history of §2, Ninth that it was designed not only to help free the unions from the influence, coercion and control of the carriers but also to resolve a wide range of jurisdictional disputes between unions or between groups of employees."

On the very same page of its brief, Petitioner attempts to take advantage of the Fifth Circuit's suggestion that subjects of the agreements between the Respondents may well be proper topics for negotiations between the Petitioner and Respondent SCL. As stated by the Fifth Circuit below, 413 F. 2d 19, 24, it is submitted that this would be precisely the task, the exclusive task, of the National Mediation Board.[21]

In its oblique attack on the SCL merger through this litigation, Petitioner has not only failed to cite a single case supporting its argument that involves a railroad merger — Petitioner has ignored *Division #14, Order of Railroad Telegraphers* v. *Leighty*, 298 F. 2d 17 (4th Cir. 1962), cert. den. 369 U.S. 813 (1962), a case that *does* involve a merger and the scope of the National Mediation Board's jurisdiction. Here, an employee protection agreement had been reached as permitted by the Interstate Commerce Act, 49 U.S.C. §5 (2) (f) prior to the merger of the Norfolk & Western and Virginian Railway Companies. Disagreement arose over the merger of seniority rosters and one union local sued the parent union

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[21] While the Fifth Circuit affirmed the decision of the Jacksonville District Court that Petitioner's dispute was not "one for judicial determination", Petitioner is unhappy with the Jacksonville District Court's injunction ordering specific performance of the agreements between Respondents. Cases in support of the Jacksonville District Court's action are cited in Petitioner's Brief, page 15.

and the railroad seeking to enjoin the proposed seniority roster consolidation. The Court relied upon the *General Committee* cases and then defined its limited jurisdiction:

> "This trilogy of cases authoritatively determines that judicial intervention in railway labor disputes is restricted to the narrowest scope; that large segments of this field remain subject to the voluntary processes of conciliation, mediation and arbitration; that particularly in representation disputes the adjudicatory function has been committed by Congress to the National Mediation Board; and that the services of this Board may be invoked for the adjustment of grievances and disputes arising between a railroad and its employees concerning changes in rates of pay, rules, or working conditions not adjusted in conference and not referable to the Railroad Adjustment Board."

Significantly, the Fourth Circuit also noted that "district courts have no such authority where 'validity' of the contract depends upon the merits of a jurisdictional dispute."

Petitioner would apply the rationale of the dissent below which would not only considerably erode the jurisdiction of the National Mediation Board,[22] but, as will be seen, would cast the federal courts in the continuing role of evaluating

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[22] The very intent behind so much of the scheme of the Railway Labor Act must be ignored if Petitioner's support of the dissent below is to be embraced. The Act's inherent design is to remove railroad labor relations problems from the courts and commit them instead to Boards that are uniquely equipped with an understanding of the industry jargon in order that complex problems as presented herein by the competing unions can be resolved. *Brotherhood of Railroad Trainmen v. Toledo, Peoria & W. R.*, 321 U.S. 50 (1944).

what degree of "necessary" relief a rail merger has from other federal laws.[23]

3. *Approval of the SCL merger by the Interstate Commerce Commission relieves the railroad from restraints and limitations of the Railway Labor Act which would prevent effectuation of that merger.*

To fully appreciate the potential havoc (not "harmony") that would be generated by Petitioner's argument respecting the alleged applicability of Section 6 of the Railway Labor Act, *supra,* to the merging SCL, the logical events that might occur may be hypothetically considered. Ignoring the requirement that each union should reach separate, merged schedule and implementing agreements "in each craft" as stipulated in the BLF&E Protection Agreement, tripartite negotiations[24] between BLF&E, SCL and BLE would have continued to the inevitable impasse caused by inter-union rivalry. The time entailed in reaching the stalemate would have resulted in a tremendous dollar drain on the Respondent SCL because on July 1, 1967, it began fulfilling its part of the BLF&E and BLE Protection Agreements by its payment of guaranteed monthly wages and other numerous benefits to all employees covered by those Agreements, including individual members of the Petitioner. Simultaneously, SCL was being denied merger benefits by being compelled to operate its trains as if it were still two separate railroads since the then-existing seniority districts were wholly incompatible and the seniority

[23] 413 F. 2d 19, 30, *supra.*

[24] Theoretically, though perhaps not practically in this instance, other unions could and would assert their alleged interests in the dispute thus compounding the merger's obstacles.

rosters had not been merged pursuant to the mandate of the Protection Agreements.[25]

Continuing the proposed BLF&E "solution" to its chaotic end, the next procedure available to the parties might appear to be arbitration, but with neither union a signatory to the other's Protection Agreement containing an arbitration clause that is applicable only to signatories of the respective agreements, arbitration could be thwarted by either BLE or BLF&E.

Thus the route of the Section 6 Notice remains, but hardly as a remedy. Retaining in mind the BLE-BLF&E rivalry, it is logical to assume that *any* Section 6 Notice designed by SCL would result in dissatisfaction and counter-notices under Section 6 by one or both unions.

Then it must be assumed that the National Mediation Board would mediate, as was the case when the old tripartite agreement was ultimately executed back in 1945. But time has added one more ingredient to BLF&E's proposed "remedy" —the great likelihood of no agreement. Then a strike, a legal strike over the failure to agree becomes a distinct possibility unless the railroad were willing to abandon its pursuit of a merger in fact rather than a merger in name only.

The plain truth is that the prolonged and deliberate procedures for changing collective bargaining agreements in the Railway Labor Act simply do not "enable [carriers] to carry into effect the transaction so approved" by the Interstate

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[25] In actuality, it took approximately one year from the date of the merger's consummation to merge agreements of the more than twenty unions.

Commerce Commission.[26] Congress recognized this truism by enacting a remedy in 1940. Section 5(11) of the Interstate Commerce Act reads in pertinent part as follows:[27]

> "The authority conferred by this section shall be exclusive and plenary . . . and any carriers or other corporations, and their officers and employees and any other persons, participating in a transaction approved or authorized under the provisions of this section shall be and they are relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transaction."

In another merger case, also unexplained by Petitioner, *Brotherhood of Locomotive Engineers* v. *Chicago & North Western Ry. Co.*, 314 F. 2d 424 (8th Cir., 1963) cert. den. 375 U.S. 819 (1963), the effect of Section 5(11) of the Interstate Commerce Act, 49 U.S.C. §5(11) upon the Railway Labor Act came into full focus. In that case, the railroad brought a declaratory judgment action against the defendant labor unions to determine the procedures to be followed in consolidating seniority rosters at its Marshalltown Yard. The C&NW had been allowed to merge with another railroad by virtue of Interstate Commerce Commission approval. Further, the C&NW and the unions had agreed to arbitrate disputes

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[26] 49 U.S.C. §5(11)

[27] Ibid.

arising out of changes that would have to be made in the old schedule agreements, but the unions took the position that the dispute at Marshalltown Yard had to be progressed under Section 6 of the Railway Labor Act. The Court considered Section 5(11) of the Interstate Commerce Act and "whether the provisions relating to merger and providing for compensation for affected employees take precedence over the provisions of the Railway Labor Act." After quoting Section 5(11), the Court enunciated this rule:

> ". . . we believe that the cases afford very substantial support for the view that Congress intended the ICC to have jurisdiction to prescribe the method for determining the solution of labor problems arising directly out of approved mergers. Thus, like the trial court, we come to the conclusion that to hold otherwise would be to disregard the plain language of §5(11) conferring exclusive and plenary jurisdiction upon the ICC to approve mergers and relieving the carrier from all other restraints of federal law. Unquestionably, the Railway Labor Act is a federal law. We find no express or implied exception of the provisions of the Railway Labor Act from the operative provisions of §5(11)."

Respondent SCL respectfully submits that relief from the time-consuming notice and negotiation procedures of the Railway Labor Act and the resultant disastrous effects this could visit upon the merger are, contrary to the view of the dissent, "necessary" to breathe life into the merged railroad.

B. The Exclusive Jurisdiction of the National Mediation Board must prevail over the arbitration provisions of the separate BLE and BLF&E Protection Agreements.

Since Petitioner has not indicated its two arguments are in the alternative, Respondent SCL must assume that they are presented as being consistent. They are not. Either Section 6 of the Railway Labor Act requiring notice and negotiation is mandatory or the Respondents' contention for the exclusiveness of the National Mediation Board is the law. The suggestion that "voluntary" arbitration is appropriate acknowledges the inapplicability of Section 6 in this case.[28] There are additional reasons why this argument fails.

1. Petitioner seeks an order from this Court that "voluntary" arbitration is required when he has never requested arbitration of the Respondents.

If Petitioner had any right to have his dispute arbitrated under the terms of the BLF&E Protection Agreement, written notice upon the parties is the first prerequisite of Section 4:

> "In event any dispute or controversy arises between Seaboard, Coast Line, or the Merged Company and any labor organization signatory to this Agreement with respect to the interpretation or application of any provisions of this Agreement, or of any imple-

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[28] The citation of *Transportation-Communications Employees Union* v. *Union Pacific R. Co.*, 385 U.S. 157 (1966), is curious because while the case did involve two unions disputing over one aspect of available work, the nature of arbitration was *compulsory* since it was a "minor" dispute under *existing* contracts as opposed to the alleged unilateral change of a collective bargaining agreement. No Court decision has required arbitration, "voluntary" or otherwise, of a labor dispute that commenced under Section 6 of the Railway Labor Act.

menting agreement entered into between the Merged Company and individual labor organizations which are parties hereto pertaining to the said merger or related transactions, which cannot be settled by said Carriers and the labor organization or organizations involved within thirty days after the dispute arises, such dispute may be referred by either party to an arbitration committee for consideration and determination. Upon notice in writing served by one party on the other of intent by that party to refer the dispute or controversy to an arbitration committee, each party shall, within ten days, select a member of the arbitration committee and the members thus chosen shall, if they cannot agree on the disposition of the dispute within ten days, endeavor to select a neutral member who shall serve as Chairman, in which event the compensation and expenses of the Chairman shall be borne equally by the parties to the proceeding. All other expenses shall be borne by the party incurring them. Should the members designated by the parties be unable to agree upon the appointment of the neutral member within ten days, either party may request the National Mediation Board to appoint the neutral member, whose compensation and expenses shall then be paid in accordance with existing law. If any party fails to select its member of the arbitration committee within the prescribed time limit, the representative of such party signatory to this Agreement or his designated representative shall be deemed to be the selected member and the committee shall then function and its decision shall have the same force and effect as though all

> parties had selected their members. The decision of the majority of the arbitration committee shall be rendered within thirty days after selection of the committee, unless the parties mutually agree to a further extension and shall be final and binding, except that in any case in which there is an unequal number of carrier and organization members on the arbitration committee, the decision of the neutral member shall be final and binding."

No notice has ever been given.

To contend that this litigation might have "frustrated" voluntary arbitration cannot operate as an excuse for the neglect in not making written request when the tripartite discussions broke down in April, 1967 (Record, Vol. I, p. 169). This litigation and the implementation of the contested agreements did not take place until January, 1968. Surely the Petitioner slept upon any arbitration rights he might have had for too long. If arbitration were possible, those ten months were the propitious time — before the posture of the prospective disputants so drastically changed by virtue of the effectuation of the negotiated agreements.

2. *Tripartite arbitration of this dispute may be impossible if either union refused to participate.*

In the same manner that Petitioner minimized the critical distinctions in other parts of the respective Protection Agreements, key aspects in the respective arbitration clauses were slighted.

The BLF&E Protection Agreement has an arbitration clause available to SCL and *"any* labor organization signatory to this Agreement."

The BLE Protection Agreement has an arbitration clause available to SCL and "*the* labor organization signatory to this Agreement."

With neither BLE nor BLF&E signatory to the other's Protection Agreement, it can be therefore contended that tripartite arbitration could be thwarted by the refusal of either BLE or BLF&E to participate since neither would be bound by the other's arbitration provision notwithstanding their many common provisions or the fact that SCL is a party to each.

The decision below, in upholding the exclusive jurisdiction of the National Mediation Board, has not detracted in any manner from the arbitration provisions of the Protection Agreements[29] or the Railway Labor Act.

CONCLUSION

Once a railroad merger has been approved and separate employee protection agreements have been reached with all involved labor unions, the merged railroad should be permitted the latitude provided by the Interstate Commerce Act to carry the transaction into effect.

Respondent SCL contends that the former tripartite agreements have been validly superseded bilaterally by agreement with the Petitioner and, further, that the notice and negotiation provisions of the Railway Labor Act are inapplicable to this case because of the Interstate Commerce Commission's approval of the merger.

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[29] An argument could be made that neither arbitration provision in either the BLE or BLF&E Protection Agreement requires arbitration of a change in the terms of an existing agreement or the writing of the terms of a new agreement. Section 4 requires arbitration "with respect to the interpretation or application" of an agreement.

The inter-union rivalry that is an integral part of this case is anything but novel and the Court below should be affirmed in its holding that the National Mediation Board provides the exclusive forum for the dispute raised by the Petitioner.

Accordingly, for the reasons stated, this petition for certiorari should be denied.

Respectfully submitted,

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